IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 22ND AUGUST 2007 / 31ST SRAVANA 1929

CRL.A.No. 709 of 2003()

SC.988/2002 of III ADDITIONAL ADDL.SESSIONS COURT, KOLLAM

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APPELLANT: ACCUSED

RAMACHANDRAN, @ ICE,
S/O.SADANANDAN, THOPPIL VEEDU,
MULLUVILA CHERRI, VADAKKEVILA VILLAGE,
KOLLAM TALUK.

BY ADV. SRI.SALIL NARAYANAN K.A

RESPONDENT: COMPLAINANT

STATE OF KERALA REP.BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTORSRI. PUZHAKKARA MUHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.P. NO.4467 OF 2003 IN CRL. APPEAL NO. 709 OF 2003.

DISMISSED

22.8.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 709 OF 2003

Dated this the 22nd day of August, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No.988 of 2002 on the file of the III Additional Sessions Court, Kollam. The appellant faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellant - accused was that on 21.8.1997 at 3 p.m. while the Excise Inspector, Kollam range was on patrol duty, he found 15 plastic covers each containing 125 ml. of arrack kept in a plastic bag in the house of the appellant. To prove the case against the appellant, the prosecution examined PWs.1 to 5 and produced Exts.P1 to P6 as well as MOs. 1 to 4. No oral or documentary evidence was adduced on the side of the defence. On closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. The accused denied the charges levelled against him. However, relying on the evidence adduced by the prosecution, the trial court found the accused guilty under Section 55(a) of the Abkari Act, convicted him thereunder

and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months. The appellant was also given the benefit under Section 428 Cr.P.C. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. The learned counsel appearing for the appellant has raised the following contentions: (i) the trial court was not justified in finding the appellant guilty under Section 55(a) of the Abkari Act relying on the evidence of the official witnesses alone as the two independent witnesses examined turned hostile to the prosecution, (ii) the trial court committed serious error in finding the appellant guilty under Section 55(a) of the Abkari Act in the light of the principles laid down by this Court in the decisions reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631**, (iii) the search conducted by PW.4 was not in accordance with the provisions of Section 36 of the Abkari Act as the prosecution had not proved that the house in question belonged to the appellant and (iv) the

sentence awarded is excessive.

5. The trial court mainly relied on the evidence of PWs.3 and 4 to find the appellant guilty of the charges levelled against him. PW.4 was the Excise Inspector who detected the offence. He stated before the court below that on getting information that the accused was engaged in selling arrack in his house, he prepared a search memo , sent it to the court and went to the house of the accused. He further stated that he conducted search of the house of the appellant in the presence of independent witnesses and found MO.1 plastic cover containing 15 packets of arrack. PW.4 further stated that the contents of two packets were taken as sample, the contraband articles were seized as per Ext.P1 seizure mahazar and the accused was arrested and produced before the Excise Range office along with the contraband articles. PW.3 was the Preventive Officer who had accompanied PW.3 on the date of the incident. He stated that when the excise party reached the house of the accused, the accused was sitting on a cot inside the room and that the accused was informed regarding the intention to conduct the search. He corroborated the evidence of PW.4 in all material particulars. The Excise Inspector who was examined as PW.5 stated that he conducted investigation of the case. He also stated that he proved Ext.P6 chemical analysis report which showed that the sample

contained 19.74% by volume of ethyl alcohol.

6. The criticism raised against the evidence of these witnesses is that PWs.1 and 2, the independent witnesses did not support the prosecution case. There is no legal bar in accepting the evidence of the official witnesses or the investigating officers, if their evidence is free from doubt or any infirmity. The trial court was convinced that PW.4 had conducted search of the house of the appellant along with other excise officials and seized the contraband articles. The evidence of PWs.3 and 5 would show that the contraband articles and the sample were produced before the court on the next day. Further, the evidence of PW.4 would show that the residue and the sample were kept in safe custody till those items were produced before the court. The trial court was, therefore, justified in accepting the evidence of PWs.3 to 5.

7. The next question to be considered is whether the conviction under Section 55(a) of the Abkari Act is justifiable or not. As per the principles laid down by this Court in the decisions reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631**, the prosecution must allege and prove that possession of the contraband articles by the accused was in

connection with export, import, transport or transit. The prosecution case was that the appellant was found in possession of 15 packets of arrack for the purpose of sale. But there is no evidence to show that the appellant was engaged in the sale of arrack or that the contraband articles were kept by him in connection with export, import, transport or transit. Hence, the conviction entered by the trial court under Section 55(a) of the Abkari Act is not legally sustainable and hence liable to be set aside. This Court has already found that the trial court was justified in accepting the evidence of PWs.3 to 5 and that on the basis of their evidence the prosecution succeeded in proving that the appellant was found in possession of 15 packets of arrack. That being so, the appellant can be convicted only under Section 8(1) read with Section 8(2) of the Abkari Act.

8. The third point to be considered is whether the search conducted by PW.4 was in accordance with Section 36 of the Abkari Act and the provisions of the Kerala Excise Manual. According to the learned counsel appearing for the appellant, the prosecution had not adduced any evidence to prove that the house in which search was conducted by PW.4 belonged to the appellant. PW.4 had stated that he had prepared a search memo and had explained to the appellant the purpose of the search. But, there is no record showing issuance of the search memo. If so, the search

conducted by PW.4 is not in accordance with Section 36 of the Abkari Act and the provisions of the Kerala Excise Manual. Further, the case set up by the appellant was that he was an ice merchant. Considering the evidence of PW.4, this Court is of the view that infraction of the provisions of Section 36 of the Abkari Act and the provisions of the Kerala Excise Manual by itself will not vitiate the trial, if the court finds that the evidence adduced by the prosecution is otherwise acceptable. In the above circumstances, the argument of the learned counsel in this regard is not very relevant.

9. The next point to be considered is regarding the sentence to be awarded against the appellant, having found that he was found in possession of 15 packets of arrack and thereby committed offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act. Learned counsel appearing for the appellant submits that though the offence was detected on 21.8.1997, final charge was filed only in 2001. As per Section 50 of the Abkari Act, investigation should be completed without unnecessary delay. The delay occurred in this case has not been satisfactorily explained. The only statement made by PW.5 in this regard was that there was delay in getting the chemical analysis report. But the records would show that the chemical analysis report was received during

1997 itself. That apart, the total quantity of arrack found in the possession of the appellant was only 1.875 litres. Considering the entire facts and circumstances of the case, this Court feels that a lenient view can be taken in the case of the appellant with regard to the sentence.

10. Accordingly, the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is set aside. The appellant is found guilty under Section 8(1) read with Section 8(2) of the Abkari Act, he is convicted thereunder and sentenced to undergo simple imprisonment for six months and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of three months. The appellant is also entitled to the benefit under Section 428 Cr.P.C.

The Crl. Appeal is dismissed, subject to the above modification in the conviction and sentence. The bail bonds executed by the appellant shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A.NO.709/2003

JUDGMENT

22ND AUGUST, 2007